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October Term, 1951.

THE DELAWARE AND HUDSON COMPANY,
Petitioner,

v.

BOSTON RAILROAD HOLDING COMPANY ET ALS.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

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Supreme Court of the United States.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Your petitioner, The Delaware and Hudson Company, respectfully prays that a writ of certiorari be issued to review the "decree after rescript" of the Supreme Judicial Court of the Commonwealth of Massachusetts for Suffolk County entered November 27, 1951, which decree was entered pursuant to rescript (R. 106) from the Full Bench of the Supreme Judicial Court for said Commonwealth entered November 9, 1951, in proceedings arising out of the statutory dissolution and liquidation of the property of Boston Railroad Holding Company (hereinafter called the Holding Company) pursuant to Massachusetts Acts of 1946, c. 518, and involving the relative rights of the different holders of the Holding Company's preferred shares in the liquidation of the Holding Company's prop-

erty, consisting entirely of shares in the Boston & Maine Railroad or proceeds from the sale thereof. Such decree was entered on the petition filed by your petitioner on December 7, 1949 (R. 1-18), praying that your petitioner, as the holder of 10,000 shares of the preferred stock of the Holding Company, and the holders of the remaining 14,150 shares of the publicly held preferred stock of the Holding Company, be adjudged entitled to preference and priority over the other preferred stock of the Holding Company, all owned by New York, New Haven & Hartford Railroad (hereinafter called New Haven), in the liquidation of the Holding Company's property. Among the grounds stated in the petition in support of the above-mentioned priority in favor of the publicly held preferred stock of the Holding Company were:

(1) a right of preference arising from the sale by the New Haven to the public in 1911 of part of its preferred shares all of which had a statutory lien on all the Boston & Maine stock at any time owned by the Holding Company and from the guaranty by the New Haven of the payment of cumulative dividends and, in the event of liquidation, of $100 upon each share of the preferred stock so sold to the public;

(2) an independent right of preference in any liquidation of the Holding Company established in favor of the publicly-held preferred stock of the Holding Company over the preferred stock owned by the New Haven by the consent decree entered October 17, 1914, and the decree entered at the New Haven's request on June 4, 1923, in proceedings under the Sherman Act by the United States District Court for the Southern District of New York in the case of *United States of America* v. *New York, New Haven & Hartford Railroad Company et al.*

Opinion Below.

The opinion of the Supreme Judicial Court is reported in Massachusetts Advance Sheets for 1951, page 1093, 102 N.E. (2d) 67, and appears at pages 84 to 105 of the Record.

The majority opinion held that the right of priority claimed by your petitioner did exist under Massachusetts law (R. 96, 101) but that such priority was destroyed (R. 97) by the "Consummation Order and Final Decree" entered September 11, 1947, by the United States District Court for the District of Connecticut (R. 41, 93) in the reorganization of the New Haven under Section 77 of the Bankruptcy Act, and that no independent right to priority was created by the anti-trust decrees.

The majority opinion of the Massachusetts court seems to proceed on the theory that the Holding Company was in bankruptcy or reorganization, which it was not, and that somehow the discharge in bankruptcy of the New Haven which had guaranteed the Holding Company's publicly held preferred stock destroyed the preference theretofore enjoyed by such stock.

The separate opinion of Counihan, J. (R. 105), dissented as to the effect of the decree entered June 4, 1923, in the anti-trust proceedings and held that under such decree your petitioner and other holders of the publicly held preferred stock were entitled to priority over the preferred stock held by the New Haven in any liquidation of the Holding Company.

Questions Presented.

1. Whether the discharge granted the New Haven, under the consummation order and final decree, in its reorganization under Section 77 of the Bankruptcy Act,

deprived the publicly held preferred stock of the Holding Company (a Massachusetts corporation not at any time a bankrupt or a debtor in reorganization proceedings) of the right to be preferred over preferred stock of the Holding Company owned by the New Haven in any liquidation of the Holding Company—a right of priority which, as the court decided, existed under Massachusetts law in favor of the publicly held preferred stock "down to the time of the consummation decree" (R. 101).

2. Whether the decrees of October 17, 1914, and June 4, 1923 entered in the United States District Court for the Southern District of New York established an independent right of priority in favor of the publicly held preferred stock of the Holding Company in any liquidation of that company which was not destroyed by discharge of the New Haven in proceedings for its reorganization under Section 77 of the Bankruptcy Act.

Summary Statement of the Matter Involved.

This litigation represents another chapter in the long struggle which began when, in 1906, the New Haven Railroad acquired a controlling interest in the stock of the Boston & Maine Railroad, a transaction which the Supreme Judicial Court of Massachusetts in 1908 held to be *ultra vires* the New Haven. See *Attorney General* v. *New York, New Haven & Hartford Railroad Co.*, 198 Mass. 413, 418-420. When the facts of this transaction first became known, intense public opposition was aroused in New England and elsewhere. See Mason, *Brandeis, A Free Man's Life* (Viking Press, 1946), chapters 12 and 13. Sen. Doc. No. 543, 63d Cong., 2d Sess. As a result of this situation, Boston Railroad Holding Company was created in 1909 by Special Act of the Massachusetts Legislature for the

purpose of acquiring the New Haven's Boston & Maine stock, thus permitting the New Haven to retain indirectly its controlling interest in the Boston & Maine while submitting it to some measure of control by the Massachusetts Legislature (St. 1909, c. 519). For history of this legislation see *Codman* v. *New York, New Haven & Hartford Railroad Co.*, 253 Mass. 144; *Hurley* v. *Boston Railroad Holding Co.*, 315 Mass. 591; *Delaware & Hudson Co.* v. *Boston Railroad Holding Co.*, 323 Mass. 282.

St. 1909, c. 519, provided: the stock of the Boston & Maine which might be acquired by the Holding Company should not thereafter be sold without express authority from the Legislature; any railroad corporation incorporated under the laws of Massachusetts at the date of passage of the Act might guarantee the principal of and the dividends and interest upon the stock and bonds of the Holding Company; and the stock of the Holding Company should not be sold or be transferable without such a guaranty. Following incorporation of the Holding Company, large blocks of Boston & Maine stock were transferred to it in return for issuance to the New Haven of 31,065 shares of capital stock of the Holding Company and certain debentures. This stock is still held by the New Haven, and is all of the capital or common stock of that company now outstanding and the only stock of the Holding Company having power to vote (R. 34-35).

In 1910, further Massachusetts legislation authorized the Holding Company to issue preferred stock (St. 1910, c. 639). Section 2 of that Act created a statutory lien in favor of the preferred stock in the following terms:

> "Subject only to the rights of creditors of said Boston Railroad Holding Company existing at the date of the stockholders' meeting at which any of said preferred stock is first authorized, said preferred stock,

to the amount thereof at par at any time outstanding, and of all accrued and unpaid dividends thereon, shall be and constitute a charge and lien upon, and be secured by, all stock of the Boston and Maine Railroad at any time held by said Boston Railroad Holding Company."

In the years 1910 and 1911 the Holding Company duly issued 272,939 shares of preferred stock in accordance with and pursuant to the provisions of the 1910 Act (R. 35). The greater part of this preferred stock was issued to the New Haven in exchange for its debentures of the Holding Company. The balance of the preferred stock was purchased by the New Haven and the cash received therefor used by the Holding Company to purchase further shares of Boston & Maine stock (R. 35).

Between January 10, 1911, and June 30, 1911, the New Haven sold to various members of the public 28,000 shares of this preferred stock. In accordance with the provisions of the statutes referred to, the New Haven caused the certificates for these 28,000 shares to be endorsed with a guaranty duly executed by it and reading as follows:

"For value received, The New York, New Haven & Hartford Railroad Company, a corporation established and acting under the laws respectively of Connecticut, Massachusetts, and Rhode Island, hereby guarantees the payment of cumulative dividends on the shares of stock represented by this certificate at the rate of four per centum (4%) per annum as stipulated in this certificate, and the payment of one hundred dollars ($100) upon each share of said stock in case of liquidation or distribution of Boston Railroad Holding Company and of any deficiency resulting from a sale under the provisions of Section 4 of Chapter

639 of the Acts of Massachusetts of the year 1910." (R. 35-36.)

When, in the year 1944, The Delaware and Hudson Company acquired 10,000 of these 28,000 shares, the certificates bore the New Haven's above endorsement, and when new certificates were delivered they bore a like endorsement duly executed by the New Haven (R. 36). Of the 28,000 shares, 24,150 shares (including the 10,000 shares held by your petitioner) are still held by the public.

On July 23, 1914, the United States of America brought a suit in equity in the District Court of the United States for the Southern District of New York in which the New Haven, the Holding Company and other corporations and individuals were named as defendants, and in which it was alleged that the defendants were violating the Sherman Anti-Trust Act (R. 43). It was alleged that the New Haven was the principal instrumentality for effecting the alleged unlawful practices and results set forth in the petition. Appearances were filed in these proceedings by both the New Haven and the Holding Company. On October 17, 1914, a consent decree was entered in these proceedings. A copy of the material portions of this decree is annexed to the agreed statement and marked "D" (R. 62-78).

This decree adjudged that the New Haven and the other defendants were combinations in restraint of trade and had attempted to monopolize and were monopolizing a part of interstate trade and commerce. It also directed the New Haven to assign its common stock and preferred stock of the Holding Company to trustees. The decree provided for the sale by the trustees of the Boston & Maine shares owned by the Holding Company, free from the statutory lien in respect of the preferred stock of the Holding Company owned by the New Haven and subject only to the lien

of the 28,000 shares of preferred stock of the Holding Company held by other persons.

The decree directed that out of the proceeds from the sales of property of the Holding Company the trustees should pay—

> (*a*) all the debts of the Holding Company and all reasonable expenses;
>
> (*b*) all sums due to the holders of the 28,000 shares of the preferred stock of the Holding Company upon the winding up of its affairs;
>
> (*c*) the balance of the proceeds to the New Haven Company or its legal representatives or assigns when and as released.

The time fixed in the 1914 decree within which the trustees were directed to sell the Boston & Maine stock was subsequently extended from time to time and the Boston & Maine stock remained unsold when, on May 8, 1923, the New Haven filed a petition, a copy of which is annexed to the agreed statement (R. 78-81). In this petition the New Haven asked that the 1914 consent decree be modified in substance so as to permit the trustees appointed thereunder to return to the New Haven its stock in the Holding Company. In this petition the New Haven expressly made its request subject to the proviso (R. 80):

> ". . . that the right attaching to the 28,000 shares of preferred stock of the Boston Railroad Holding Company held by other persons, to be preferred in any liquidation of said Boston Railroad Holding Company to the remaining shares of the common and preferred stock of said Boston Railroad Holding Company held by the New York, New Haven and Hartford Railroad Company, shall be in no manner diminished or impaired."

On this petition a decree was entered on June 4, 1923 (R. 82-84), which provided in part:

> ". . . That said decree entered October 17, 1914, be amended by striking out all the provisions in paragraphs numbered First and Second of said decree, excepting that the right attaching to the 28,000 shares of preferred stock of the Boston Railroad Holding Company held by other persons to be preferred in any Liquidation of said Boston Railroad Holding Company to the remaining shares of the common and preferred stock of the said Boston Railroad Holding Company held by the New York, New Haven and Hartford Railroad Company, shall in no manner be diminished or impaired, and the certificates of said 28,000 shares of preferred stock shall be presented at the office of the Boston Railroad Holding Company in Boston, Massachusetts, to be stamped as entitled to such preference."

Pursuant to the decree of June 4, 1923, the stock of the Holding Company in the hands of the trustees was returned to the New Haven, and at or about that time the Holding Company caused the following legend to be stamped on the certificates representing all of the said 28,000 shares of preferred stock of the Holding Company:

> "'The shares represented by the within certificate are entitled to preference in liquidation according to the terms of the decree entered by the District Court of the United States for the Southern District of New York on October 17, 1914, as modified by the decree of said court entered on the 4th day of June, 1923, in the case of the United States of America v. The New York, New Haven and Hartford Railroad Company and others.'" (R. 44.)

On October 23, 1935, the New Haven filed a petition for its reorganization under Section 77 of the Bankruptcy Act in the District Court of the United States for the District of Connecticut. Pursuant to that court's order No. 45, Arthur P. Russell, an officer of the New Haven and also of the Holding Company, filed claim No. 82, "in behalf of the 24,150 shares of the Holding Company preferred stock outstanding in the hands of the public" (R. 37). This was the only claim filed on behalf of this stock. On July 28, 1944, the court entered a memorandum of decision on this claim in which it allowed a common claim (payable under clause (17), section J, of the Plan in common stock of the reorganized company) against the estate of the New Haven for breach of its guaranty of cumulative dividends upon the publicly held preferred stock of the Holding Company and upon the preferred stock of that company held in its treasury in the amount of $32 per share (R. 40). The court allowed nothing by way of common claim or otherwise in connection with the New Haven's promise to pay the $100 per share provided by the New Haven's guaranty (R. 41). The Delaware and Hudson Company has received nothing in connection with its stock in the Holding Company as a result of the New Haven bankruptcy proceedings (R. 45).

The Plan of Reorganization of the New Haven, approved and certified by the Interstate Commerce Commission and approved and confirmed by the court, provided (R. 39):

> "Sec. K . . . The principal debtor's guaranties of . . . the preferred stock of the Boston Railroad Holding Company shall not be assumed by the reorganized company. No payment shall be made by the reorganized company upon, or on account of, such guaranty of the preferred stock of the Boston Railroad Holding Company, except as provided in Clause (17) of Section J hereof. Nothing herein contained shall in any way impair any right of the public holders of the 24,150

preferred shares of the Boston Railroad Holding Company to realize on the lien or security of the shares of the capital stock of the Boston & Maine Railroad held by said Holding Company whether such right be at common law or under the statutes of Massachusetts, particularly Stat. 1909, Chap. 519, and Stat. 1910, Chapter 639, or under the decrees of the United States District Court for the Southern District of New York under date of October 17, 1914, and June 4, 1923."

On September 11, 1947, the United States District Court for the District of Connecticut entered its order No. 1007 entitled "Consummation Order and Final Decree." Paragraph 3 of subdivision II of this decree provided in part as follows (R. 41, 42):

"Transfer and Discharge. Upon the consummation date:

"(i) all the business and affairs and the entire property and estate of the Debtor and the Secondary Debtors of every name and nature and all right, title and interest of Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, as Trustees of the property of the Debtor and the Secondary Debtors (herein called the 'Bankruptcy Trustees'), the Certificate of Amendments having first been filed in the Office of the Secretary of State of the State of Connecticut, shall vest in and become the absolute property of the Reorganized Company, free and clear of all claims, rights, demands, interest, liens, encumbrances of creditors or other obligees of the Debtor, or of the Secondary Debtors, or their properties, except for the claims hereinafter referred to, which are to be assumed or paid by the Reorganized Company and of all rights and claims of the holders of shares of the capital stock of the Debtor and the Secondary Debtors:

> "(ii) the Debtor and the Secondary Debtors shall be discharged and released forever from all of their obligations, debts and liabilities, whether or not presented or allowed in these proceedings, including, without limitation, all claims made, assumed or guaranteed by the Debtor or the Secondary Debtors or enforceable against their property, except such claims as are to be paid or assumed by the Reorganized Company in accord with the Plan: . . ."

The consummation order and final decree also contained an injunction (R. 42-43).

At the present time the property of the Holding Company consists entirely of shares of stock of various classes of the Boston & Maine Railroad and the proceeds of such stock thereof as has been sold by the Receiver (R. 45). The fair market value of the Boston & Maine stock owned by the Holding Company on the basis of the most recent market quotations available on January 12, 1951 (including the proceeds from the sales thereof), did not exceed $4,000,000 (R. 47). The New Haven now holds 247,759 shares of preferred stock of the Holding Company of the par value of $24,775,900, including 2820 shares formerly sold and guaranteed by it and later reacquired. 24,150 shares of the preferred stock guaranteed by the New Haven with a par value of $2,415,000 are now held by persons other than the Holding Company or the New Haven, on which no dividends have been paid since July 10, 1937 (R. 36, 37).

In 1946 the Holding Company was dissolved by Special Act of the Massachusetts Legislature (St. 1946, c. 518), which authorized appointment of a receiver under certain circumstances, regulated in various ways the manner in which the affairs of the Holding Company were to be wound up and provided that the Receiver should distribute the

assets in accordance with the rights of the respective parties in interest. By decree dated June 15, 1949, a receiver was duly appointed in accordance with this statute (R. 34). On December 7, 1949, your petitioner filed its petition (R. 1-18) for determination of rights of the publicly held preferred stock. The Single Justice reported the case without decision on the pleadings and agreed statement to the Full Bench (R. 1).

Statutes Involved.

The statutes involved are Section 77 of the Bankruptcy Act, particularly paragraph (f), U.S.C. (1946 Ed.) Title 11, § 205 (f), and the Massachusetts statutes governing the Holding Company (St. 1909, c. 519; St. 1910, c. 639; St. 1946, c. 518; see Appendix, *infra*, pp. 33 to 44).

Jurisdiction.

Title 28 U.S.C. section 1257(3) gives this court jurisdiction to review by writ of certiorari final decrees rendered by the highest court of a state "where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treatise or statutes of, or commission held or authority exercised under, the United States." In the present case the court below, as appears from its opinion, decided two substantial Federal questions adversely to the petitioner.

The first such question relates to the effect of the consummation decree entered in proceedings for the reorganization of the New Haven under Section 77 of the United States Bankruptcy Act. In its petition filed December 7, 1949, The Delaware and Hudson Company alleged (R. 3) the sale by the New Haven of preferred stock of the Hold-

ing Company guaranteed by the New Haven as required by statute, alleged (R. 3, 4) that the New Haven filed a petition for a reorganization under Section 77 of the Bankruptcy Act in 1935, set out (R. 4) certain provisions of the plan of reorganization approved and confirmed by the court, and asserted (R. 5) that under the foregoing circumstances the "publicly held preferred stock of the Holding Company (all bearing the New Haven's unperformed guaranty) is and should be entitled to preference over the preferred stock bearing no such guaranty owned by the New Haven." In paragraph 10 of its answer (R. 26-28) the New Haven specifically set up certain portions of the "consummation order and final decree" entered September 11, 1947, by the District Court of the United States for the District of Connecticut. In its opinion the court below (see R. 95-98, 101) held that under Massachusetts law, as a result of the guaranty, a priority in favor of the publicly held stock did exist down to the time of the consummation order and final decree, but that this right was destroyed by that order and decree. Where a right granted by the Bankruptcy Act is at issue, or where there is a question as to the effect of proceedings in bankruptcy and of a discharge granted therein, a Federal issue is raised. *Lesser* v. *Gray*, 236 U.S. 70. *Zavelo* v. *Reeves*, 227 U.S. 625. *Rector* v. *City Deposit Bank Co.*, 200 U.S. 405. The issue thus raised in the present case is substantial because, as shown below, the Massachusetts court extends the effect of a discharge in bankruptcy so as to alter not only relations between the debtor and its creditors or stockholders, but the relations between two groups of stockholders of another corporation not a debtor in reorganization, a thing which the Federal court in Connecticut neither had the power to do under applicable decisions of this court nor attempted to do. In effect the Massachusetts court, in reaching the conclusion it did, virtually nullified a plan of

reorganization approved and certified by the Interstate Commerce Commission and approved and confirmed by the Bankruptcy Court.

A second Federal issue relates to the effect of the anti-trust decrees in the United States District Court for the Southern District of New York. Petitioner claimed a priority under the terms of these decrees as a separate ground for the relief sought (R. 5-8). The court below decided this issue adversely to the petitioner (R. 98, 99). A right claimed under the decree of a Federal court is a right "claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." *Donohue* v. *Vosper*, 243 U.S. 59. *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33. This question likewise is substantial, not only because it, like the first question, involves large amounts of money to members of the public, but because it raises substantial questions as to enforcement of the anti-trust laws.

Reasons for Granting the Writ.

I.

IN DECIDING THAT THE CONSUMMATION ORDER AND FINAL DECREE IN THE NEW HAVEN REORGANIZATION PROCEEDINGS DESTROYED THE PRIORITY OF THE PUBLICLY HELD PREFERRED STOCK, THE MASSACHUSETTS COURT DECIDED A FEDERAL QUESTION OF SUBSTANCE IN A WAY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT OR WITH THE BANKRUPTCY ACT.

1. The petitioner contended before the court below that the sale and guaranty by the New Haven of a portion of its preferred stock, secured by the statutory lien, created a priority in favor of the publicly held preferred stock in

any liquidation of the Holding Company. The court below decided (R. 101):

> "Down to the time of the Consummation Decree, priority in favor of the publicly held stock *did* exist. But, as we have stated above, the situation was different after the Consummation Decree." (Italics in original.)

The principle of Massachusetts law establishing this priority was determined to be as follows (R. 95, 96):

> "The petitioner argues that this guaranty was tantamount to an agreement on the part of the New Haven to subordinate its interests in the assets of the holding company to the interests of the holders of the public preferred, all of whose stock had been guaranteed. The petitioner relies on such cases as *Matter of Title & Mortgage Guaranty Co. of Sullivan County*, 275 N. Y. 347, *Pink* v. *Thomas*, 282 N. Y. 10, *Ferris* v. *Prudence Realization Corp.*, 292 N. Y. 210, S. C. 323 U. S. 650, and *Agricultural Trust & Savings Company's Mortgage Pool Case*, 329 Pa. 581. These cases hold that a guarantor of mortgage certificates, who also has an interest in the mortgage, cannot share in the proceeds of its collection until the certificate holders are paid, unless there is a clear reservation in the certificate of the right of the guarantor to share on a parity with other certificate holders. The rationale of these cases seems to be that, if the guarantor were to share in the proceeds of the security before the holders of the guaranteed obligations have been paid, he would be derogating from his guaranty. This principle finds support in many jurisdictions and appears to be the prevailing rule. We accept it as the law of this Commonwealth."

The foregoing determination is conclusive as to the applicable Massachusetts law. *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64.

2. Having held that the New Haven's guaranty and the attendant circumstances did create a right of priority in the publicly held preferred, the court below decided that this right was destroyed by the "Consummation Order and Final Decree," particularly by paragraph 3 of subdivision II thereof (R. 41, quoted at p. 11, above), which contained the customary provisions in general terms discharging the debtor and its property and vesting its property in the reorganized company. The court below stated (R. 96, 97):

> "As indicated above, the consummation decree entered in 1947 released the New Haven from its guaranty of the preferred stock of the holding company and was an effective bar to the enforcement of that guaranty. Provision was made for the revesting in the reorganized New Haven of its 'entire property . . . free and clear of all claims . . . liens, [and] encumbrances of creditors, or other obligees' of the New Haven, which, of course, included its preferred shares in the holding company. The New Haven was 'discharged and released forever from all of . . . [its] obligations, debts and liabilities.' All persons, firms and corporations were enjoined from further prosecuting by any type of proceedings any claims against the New Haven except those specifically imposed on it during the course of the reorganization. Reading the plan of reorganization and the consummation decree together, we think that their combined effect was to reconstitute the reorganized New Haven the absolute owner of its shares of preferred stock in

the holding company, that as such an owner it was to have all the rights accorded to those shares by St. 1910, c. 639, and that it was not thenceforth to be affected in any way by its earlier guaranty of the preferred shares sold to the public. Thus with the guaranty no longer enforceable the principle now invoked by the petitioner has no application."

The court thus stressed those provisions of the final decree which revested in the reorganized New Haven its property free and clear of all claims, liens and encumbrances of creditors of the New Haven. In doing so the court completely overlooked the fact that the right asserted by your petitioner was not a claim, lien or encumbrance on the New Haven's preferred stock. Rather it is a right to priority in liquidation of the Boston and Maine stock owned by the Holding Company, never a debtor in the reorganization of the New Haven. The rights asserted by your petitioner are rights in property of the Holding Company, not in property of the New Haven.

3. The court below erred in other respects in dealing with the consummation decree in bankruptcy. The petitioner contended in the court below that the utmost that the New Haven's discharge did was to constitute a personal defense, if pleaded, to an action on the guaranty; and that the obligation itself was not extinguished; and that the prior lien in favor of the publicly held preferred shares upon the Holding Company's Boston & Maine stocks growing out of the Massachusetts statutes and the New Haven's sale and guaranty of a portion of its preferred stock was unimpaired. As to this contention the court stated (R. pp. 97, 98):

". . . We think that it would be giving too narrow effect to that decree in view of its broad language to

> keep alive rights flowing from the guaranty on the technical ground that only the remedy to enforce it was barred. As was said by Holmes, J., in *The Western Maid*, 257 U. S. 419, at page 443, 'Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp.' "

The decision of the court below on the foregoing point is at variance with *Zavelo* v. *Reeves*, 227 U.S. 625, 629.

4. The fundamental error of the court below is shown by the statement in its opinion (R. 98):

> "Were the Petitioner's argument to prevail, it would defeat and render illusory an important objective of the Consummation Decree."

The court thus considered that destruction of the priority of the publicly held preferred stock was an important feature of the New Haven's reorganization, a conclusion which betrays a misunderstanding of the reorganization plan itself and also of the consummation order and final decree, which merely effectuated the plan. On the contrary, the plan carefully preserved the priority of the publicly held preferred shares in section K (R. 41). The portions of the consummation order and final decree which were relied upon by the court below do not refer to the Holding Company or its publicly held preferred shares or to the New Haven as a holder of its preferred shares, and they merely contain the usual provisions transferring to the reorganized New Haven its property, free and clear of liens other than those provided for in the plan, discharging the reorganized New Haven of obligations except those to be assumed under the plan, and the usual injunctive provisions.

Neither the Interstate Commerce Commission in approving the plan, nor the United States District Court for the District of Connecticut in its consummation order and final decree, intended or attempted to alter the existing relations between the New Haven and the other preferred stockholders of the Holding Company with respect to the property of the Holding Company. The reorganization plan as approved and certified by the Interstate Commerce Commission and as approved and confirmed by the court provided in section K (R. 39):

> "Nothing herein contained shall in any way impair any right of the public holders of the 24,150 preferred shares of the Boston Railroad Holding Company to realize on the lien or security of the shares of the capital stock of the Boston and Maine Railroad held by said Holding Company whether such right be at common law or under the statutes of Massachusetts, particularly Stat. 1909, Chap. 519, and Stat. 1910, Chapter 639, or under the decrees of the United States District Court for the Southern District of New York under date of October 17, 1914, and June 4, 1923."

Despite this clear and unequivocal language showing that the rights of the public holders of preferred stock of the Holding Company were not to be impaired in any way, and despite the fact that nothing was allowed in the New Haven reorganization by way of common claim or otherwise in connection with the New Haven's guaranty of the principal amount of the public preferred (R. 41), the court below stated that (R. 97):

> "Reading the plan of reorganization and the consummation decree together, we think that their combined effect was to reconstitute the reorganized New Haven the absolute owner of its shares of preferred stock in

> the Holding Company, that as such an owner it was to have all the rights accorded to those shares by St. 1910, c. 639, and that it was not thenceforth to be affected in any way by its earlier guaranty of the preferred shares sold to the public."

5. The court below, however, concluded that the reorganization proceedings did destroy the pre-existing prior rights of the public preferred. It is clear that under Section 77 of the Bankruptcy Act the reorganization court would have had no power to accomplish such a result had it attempted to do so. Under applicable decisions of this court, a Bankruptcy Court acting under Section 77 of the Bankruptcy Act has no power to alter the relative rights of two groups of stockholders of another corporation not then being reorganized, in property owned by that corporation. Section 77(a) gives the court in reorganization exclusive jurisdiction of the debtor and its property wherever located, but, as stated in *Callaway* v. *Benton*, 336 U.S. 132:

> "There can be no question, however, that Congress did not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate."

As stated in *Meyer* v. *Fleming*, 327 U.S. 161:

> ". . . the exclusive jurisdiction granted the reorganization court by § 77 (a) is that which bankruptcy courts have customarily possessed."

In the *Callaway* case the Central of Georgia Railway Company was in reorganization under Section 77. Under the plan approved by the Interstate Commerce Commission and by the District Court, a lessor railroad, Southwestern Railroad Company, was given the alternative of selling its

property to the reorganized company or of having its lease disaffirmed. A dispute then arose between the two groups of stockholders of Southwestern as to whether under Georgia law a majority of the stockholders of Southwestern could vote to sell its property on the terms fixed in the plan of reorganization or whether a unanimous vote was necessary for that purpose. This dispute was taken to the Georgia courts. The Federal District Court in which the reorganization proceedings were pending granted a permanent injunction restraining further prosecution of the action in the State court. The Court of Appeals for the Fifth Circuit, however, reversed this order and its action was affirmed by this court, which, after referring to *Meyer* v. *Fleming, supra,* stated at page 148:

> "We conceive the jurisdiction asserted by the district court over a solvent lessor not in reorganization to be an extension of these traditional powers not justified by any provisions of the Bankruptcy Act."

The court pointed out that in the New Haven reorganization a leased line, the Boston & Providence, was in reorganization in a Massachusetts District Court while the New Haven reorganization was proceeding in Connecticut. The plan of reorganization of the New Haven contemplated purchase of the property of the Boston & Providence. This court in the *Callaway* case stated at page 144:

> "Since the Boston & Providence reorganization court had exclusive jurisdiction of its property, it can hardly be contended that the New Haven reorganization court could assume exclusive jurisdiction to decide questions arising, for example, between different classes of creditors of the Boston & Providence as to whether the New Haven's offer should be accepted."

So, in the present case, the Federal District Court in Connecticut had no power to decide questions arising between different groups of stockholders of the Holding Company as to their relative rights in the stock of the Boston & Maine held by the Holding Company.

In reaching the conclusion it did, not only did the court below attribute to the New Haven reorganization proceedings an effect which the Connecticut District Court had no power to accomplish, but the court below in effect nullified a provision of a plan of reorganization approved and certified by the Interstate Commerce Commission and approved and confirmed by the court.

Where a right granted by the Bankruptcy Act is at issue, or where there is a question as to the effect of proceedings in bankruptcy and of a discharge granted therein, a Federal issue is raised. *Lesser* v. *Gray*, 236 U.S. 70. *Zavelo* v. *Reeves*, 227 U.S. 625. *Rector* v. *City Deposit Bank Co.*, 200 U.S. 405.

We submit that the court below erroneously decided a Federal question of substance and of importance in the administration of the Bankruptcy Act and of importance to the numerous holders of publicly preferred stock in a way not in accord with the applicable decisions of this court and the Bankruptcy Act itself.

II.

THE MASSACHUSETTS COURT DEPRIVED THE PUBLIC HOLDERS OF PREFERRED STOCK OF THE HOLDING COMPANY OF RIGHTS ACCORDED THEM BY DECREES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN THE ANTI-TRUST PROCEEDINGS.

As stated by the Interstate Commerce Commission in its decision dated February 18, 1941, a public document of

which the courts take notice (244 I.C.C. 239, at pp. 268, 269), "the publicly held shares were given the additional right of preference in any liquidation of the Holding Company to the preferred shares owned by the principal debtor [the New Haven] by the decree of the United States District Court for the Southern District of New York entered June 4, 1923, in the case of United States of America v. New York, New Haven & Hartford Railroad Company, et al."

A right claimed under the decree of a Federal court is a right "claimed under the constitution, treaties or statutes of, or commission or authority exercised under, the United States," and presents a Federal issue which gives this court jurisdiction under section 1257(3) of the Judicial Code. *Donohue* v. *Vosper,* 243 U.S. 59. *Waterman* v. *Canal-Louisiana Bank & Trust Co.,* 215 U.S. 33.

The 1914 consent decree provided for sale of the Holding Company's Boston & Maine stocks by trustees appointed thereunder, and liquidation of the Holding Company. The decree specifically provided that all sums due the holders of the public preferred of the Holding Company should be paid before payment of the balance to the New Haven (R. 65). The trustees appointed under the decree had not sold the Boston & Maine stocks, however, when in 1923 the New Haven filed its petition to amend the 1914 decree. In this petition the New Haven sought the return of the Holding Company stock then in the court's possession through its trustees. Presumably in order to get what it sought, and without opposition, the New Haven asked that its stock might be returned to it subject to the proviso that "the right attaching to the 28,000 shares of preferred stock of the Boston Railroad Holding Company held by other persons, to be preferred in any liquidation of said Boston Railroad Holding Company to the remaining shares of the common and preferred stock of said Boston Railroad Holding Com-

pany held by the New York, New Haven & Hartford Railroad Company shall be in no manner diminished or impaired."

The New Haven got what it wanted in the return of its stock without opposition, and the publicly held stock got a decree or judgment of a court of competent jurisdiction giving it a right to a preference in any liquidation of the Holding Company. The provision for the protection of the public preferred was included in the decree in the form requested by the New Haven's petition, and the further requirement added that "The certificates of said 28,000 shares of preferred stock shall be presented at the office of the Boston Railroad Holding Company in Boston, Massachusetts, to be stamped as entitled to such preference" (R. 83). From this decree no appeal was taken. Pursuant thereto, the Holding Company caused an endorsement to be stamped on the certificates representing all of the public preferred which reads (R. 44 and 45):

> " 'The shares represented by the within certificate are entitled to preference in liquidation according to the terms of the decree entered by the District Court of the United States for the Southern District of New York on October 17, 1914, as modified by the decree of said court entered on the 4th day of June, 1923, in the case of the United States of America v. The New York, New Haven and Hartford Railroad Company and others.' "

There can be no doubt that the New York District Court had the power to enter the decree it did. Any possible objection based on either lack of personal jurisdiction or venue was waived by the appearance of the New Haven and the Holding Company. *Merchants Heat & Light Co.* v. *J. B. Clow & Sons,* 204 U.S. 286. *Hill* v. *Mendenhall,* 21

Wall. 453. *Kendall* v. *United States,* 12 Pet. 524. *General Investment Co.* v. *Lake Shore & Michigan Southern Railway Co.,* 260 U.S. 261. *Lee* v. *Chesapeake & Ohio Railway Co.,* 260 U.S. 653.

In proceedings under the Sherman Act the District Court in New York had ample power to divest the New Haven of its control over the Boston & Maine, exercised through its ownership of all the voting stock of the Holding Company (*Northern Securities Co.* v. *United States,* 193 U.S. 197; *United States* v. *Union Pacific Railroad Co.,* 226 U.S. 61; *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1, 77, 78; *United States* v. *Crescent Amusement Co.,* 323 U.S. 173, 189, 190; *Ethyl Gasoline Corp.* v. *United States,* 309 U.S. 436, 461), and, having taken possession, through its trustees, of the New Haven's Holding Company stock, and of the assets of the Holding Company itself, the court in New York of necessity had power to make such orders as it felt were necessary for the protection of all concerned, when it determined to return to the New Haven its stock in the Holding Company.

Consequently there can be no doubt that the court had power to give the public preferred a priority over the New Haven's preferred quite apart from whether or not such priority would tend to prevent the continuance of monopolistic practices. This is particularly true where, as here, the court acted in accordance with a petition from the New Haven itself. Furthermore, the New York District Court may well have felt that a permanent priority in favor of the public preferred would minimize chances of the New Haven's using its Holding Company stock for illegal purposes, and that court may well have felt that such a priority would insure distribution of the Holding Company's Boston & Maine stock to others than the New Haven in the event of a subsequent liquidation of the Holding Company.

Under certain circumstances subordination of the claims of a parent in the assets of a subsidiary to claims of others is a proper remedy for violation of the anti-trust laws. *Columbia Gas & Electric Corp.* v. *United States,* 151 F. (2d) 461.

In any event, the 1914 decree was a consent decree, and the 1923 modification was likewise a decree in substance entered with the consent of the New Haven, since it was entered in the form requested by the New Haven's own petition. Even if the court in New York had erred, as it did not, in the form of its decree, such error would have been waived by the New Haven and cannot now be attacked. As stated in *Swift & Co.* v. *United States,* 276 U.S. 311, at 331: "The power to enjoin includes the power to enjoin too much."

Despite the foregoing considerations and despite the fact that both the New Haven petition and the 1923 decree entered thereon refer to priority "in any liquidation" of the Holding Company, the court below concluded that it was the intent of the 1923 decree merely to continue to recognize existing equitable rights, which the court below had erroneously concluded were cut off by the reorganization of the New Haven. As to this the court said (R. 98):

> "The purpose of both of the anti-trust decrees, we think, was to recognize, under the equitable principle discussed above, the priority accruing to the owners of the publicly held preferred stock by reason of the New Haven's guaranty. It was not their purpose to create a priority not theretofore existing. Rather they undertook to confirm and perpetuate a subsisting right. That right, as we have seen, fell when the guaranty was discharged. It is to be remembered that the decrees under consideration were entered in an anti-trust proceeding brought on the equity side of the court. Of

course, the Federal court possessed plenary power to put an end to an unlawful monopoly and to do all things that were necessary and proper to accomplish that result. *Ethyl Gasoline Corp.* v. *United States,* 309 U.S. 436, 461. But it is one thing to recognize a priority already in existence and quite another to create one. It is difficult to see how the creation of a priority with respect to the publicly held preferred stock would have any legitimate place in anti-trust decrees of the sort here involved. The creation of such priority would have no tendency to put an end to the monopoly —the object of the proceeding—but would operate merely by way of punishment. If such had been the purpose of the decrees, serious questions (fol. 101) touching the power of the Federal court to enter such decrees would be presented. We do not interpret the decrees as attempting to accomplish that purpose. . . ."

As we have shown, there can be no question as to the power of the Federal court to enter the decree which it did under the circumstances here present. With respect to the words "in any liquidation," the court said at page 99 of the record:

"It would be giving undue weight to those words to construe them as conferring a priority after the foundation for the priority, namely, the guaranty, had been discharged in the reorganization proceedings. The decree did not mean that the priority was to exist 'in any liquidation' under any and all circumstances. At the time that the 1923 decree was entered the New Haven was presumably solvent and a discharge of the guaranty in bankruptcy or similar proceedings could hardly have been contemplated. The decree must be

read in the light of the conditions existing at the time it was entered."

As a matter of fact, in reaching the conclusion it did, the court ignored both the plain language of the 1923 decree and the conditions existing at the time. The Holding Company was wholly controlled by the New Haven. To say as the court did that in 1923 "The New Haven was presumably solvent and a discharge of the guaranty in bankruptcy or similar proceedings could hardly have been contemplated" is to fly in the face of conditions in the railroad industry at the time which were known to everyone and to ignore portents plainly visible at the time which subsequent events proved only too well justified. Priority in liquidation of the Holding Company would become of importance to the public preferred only in the event of the bankruptcy or reorganization of the New Haven, and it was priority under just such adverse circumstances which the New Haven offered the holders of public preferred when it filed its petition in 1923 and which the court accorded them by its decree and the subsequent stamping.

The result reached by the court below not only failed to give proper effect to the New York anti-trust decrees, but nullified a plan of reorganization which assumed that the New York decrees meant exactly what they said. As we have already pointed out, the plan of reorganization of the New Haven provided (R. 39):

> "Nothing herein contained shall in any way impair any right of the public holders of the 24,150 preferred shares of the Boston Railroad Holding Company to realize on the lien or security of the shares of the capital stock of the Boston & Maine Railroad held by said Holding Company whether such right be at common law or under the statutes of Massachusetts, particularly

Stat. 1909, Chap. 519, and Stat. 1910, Chapter 639, or under the decrees of the United States District Court for the Southern District of New York under date of October 17, 1914, and June 4, 1923."

In its supplemental report dated February 18, 1941, which modified in certain respects a plan previously approved, 244 I.C.C. 239, the Commission included a paragraph, pages 268 and 269, dealing with the Holding Company. After stating the facts as to the incorporation of the Holding Company and the issue of the preferred stock, the Commission said:

"The publicly held preferred shares were given the additional right of preference in any liquidation of the Holding Company to the preferred shares owned by the principal debtor by the decree of the United States District Court for the Southern District of New York entered June 4, 1923, in the case of United States of America v. New York, New Haven & Hartford Railroad Company et al."

The Commission then referred to certain requests of the principal debtor and of the protective committee for the public preferred and stated:

"The reasons underlying the provision for the disaffirmance of the principal debtor's guaranty of the stock are stated in the previous report. Such reasons, in our opinion, justify our previously stated conclusions, and we deny the request for the elimination of this provision. With respect to the protective committee's request that the plan should limit or terminate the principal debtor's ownership of the Holding Company's stock, we believe that this is a matter which

more properly should be determined by the court. The plan, however, should provide that the disaffirmance of the guaranty should not impair the lien of the publicly held preferred shares."

Thus it is clear that the Commission assumed that the public preferred was entitled to priority and provided for the insertion of the above-quoted clause for the express purpose of seeing that that right was in no way impaired by the reorganization of the New Haven.

The Bankruptcy Court confirmed the plan containing the provision as to the preferential rights of the publicly held preferred stock and its consummation order and final decree contained nothing, as heretofore pointed out, showing any intent on the court's part to deprive the publicly held stock of its preferential rights.

The failure of the court below to respect the rights accorded petitioner and other holders of public preferred by the anti-trust decrees presents a question of much importance which this court should review. The public preferred has been bought and sold since 1923 by members of the general investing public, bearing an endorsement, purporting to be on authority of a United States court, which any reasonable man would assume indicated an adjudicated priority good under all circumstances. The fact that the stock certificates were repeatedly stamped as they were permits only one inference, namely, that any purchaser would assume that he was buying a stock with a preference established by a court of competent jurisdiction. The Interstate Commerce Commission apparently entertained the same view. The Supreme Judicial Court, by an erroneous and unwarranted interpretation of the 1923 decree, based partly on an erroneous view as to the effect of the New Haven reorganization, has destroyed those rights,

and it is important that these errors be corrected, not only for the protection of the present public holders of Holding Company preferred, but for the guidance of other courts which may be faced with issues as to the powers of the Federal courts in anti-trust cases and as to the effect of consummation orders and final decrees in bankruptcy reorganizations.

Conclusion.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HUGH D. McLELLAN,
Attorney for Petitioner,
THE DELAWARE AND HUDSON COMPANY.

Of Counsel:
HENRY V. ATHERTON.

APPENDIX.

Statute 1909, Chapter 519.

"AN ACT TO INCORPORATE THE BOSTON RAILROAD HOLDING COMPANY.

"*Be it enacted, etc., as follows:*

"SECTION 1. Walter C. Baylies, Robert M. Burnett, Frederic C. Dumaine, their associates and successors, are hereby made a corporation by the name of the Boston Railroad Holding Company, for the sole purpose of acquiring and holding the whole or any part of the capital stock, bonds and other evidences of indebtedness of the Boston and Maine Railroad, and of voting upon all certificates of stock so acquired and held, and of receiving and collecting dividends and interest upon said stock, bonds and other evidences of indebtednesss; and for said purpose said corporation shall have the powers and privileges and be subject to the liabilities, duties and provisions contained in sections two, three, four, six, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-eight, twenty-nine, thirty, thirty-one, thirty-two, thirty-three, thirty-four, thirty-five, thirty-six, thirty-seven, thirty-eight, thirty-nine, forty-five, forty-six, forty-seven, forty-eight, forty-nine, fifty, seventy-one, seventy-two, seventy-three, seventy-four, seventy-six, seventy-seven, seventy-eight, seventy-nine, eighty-one, eighty-two, eighty-three, eighty-four, eighty-five, eighty-six, eighty-seven, eighty-eight, eighty-nine and ninety of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three, and acts in amendment thereof and in addition thereto, so far as said sections and acts are not inconsistent with the provisions of this act.

"SECTION 2. The capital stock of said corporation shall be one hundred thousand dollars, divided into shares of one hundred dollars each, and said corporation may, at a meeting duly called for the purpose, by a vote of a majority of all its stock, authorize an increase or reduction of its capital stock in the manner provided by sections forty and forty-one of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three: *provided*, that such increase or reduction shall be approved by the board of railroad commissioners. A majority of the officers and directors of the Boston and Maine Railroad and of said corporation shall be citizens of Massachusetts, and the principal offices and places of business of said corporations shall be in the city of Boston, in said commonwealth, and all meetings of the directors of said corporations shall be held in this commonwealth.

"SECTION 3. The stock of the Boston and Maine Railroad which may be acquired by said Boston Railroad Holding Company shall not be sold by it without express authority from the legislature; and any proposed sale thereof shall be reported to the board of railroad commissioners, who shall investigate and report to the legislature respecting the advisability or expediency of such sale. The bonds, notes or other evidences of indebtedness of the Boston and Maine Railroad which may be acquired by said Boston Railroad Holding Company shall not be sold, transferred, pledged or otherwise disposed of without the approval of the board of railroad commissioners, but this provision shall not be construed so as to impair the rights of creditors of said Boston Railroad Holding Company to secure payment of any indebtedness due them.

"SECTION 4. Any railroad corporation incorporated at the date of the passage of this act under the laws of this commonwealth may guarantee the principal of and the dividends and interest upon the capital stock, bonds, notes

and other evidences of indebtedness of said Boston Railroad Holding Company, and may acquire and hold said stock, bonds, notes and other evidences of indebtedness: *provided, however,* that the shares of stock of said Boston Railroad Holding Company shall not be sold or transferable until said stock has been guaranteed as hereinbefore provided. Any railroad corporation acquiring said stock as hereinbefore provided shall not thereafter sell the same without the express authority of the legislature. The commonwealth may at any time by act of the legislature, upon one year's notice, take or acquire by purchase or otherwise the stock, bonds, notes and other evidences of indebtedness issued by the said Boston Railroad Holding Company; *provided, however,* that such taking or purchase shall include all said securities of said company; and upon motion of the attorney-general, the compensation to be paid therefor shall be determined in the manner provided in section seven of Part II of chapter four hundred and sixty-three of the acts of the year nineteen hundred and six. In the event of such taking the commonwealth shall secure any corporation from which stock, bonds, notes or other evidences of indebtedness are taken against any liability arising by reason of its having guaranteed the principal thereof and the dividends and interest thereon under authority of this act. The acquisition by any railroad corporation, as hereinbefore provided, of any of the stock, bonds, notes or other evidences of indebtedness of said Boston Railroad Holding Company shall be deemed to be an acceptance by such railroad corporation of all of the terms and provisions of this act.

"SECTION 5. This act shall take effect upon its passage.

"*Approved June 18, 1909.*"

Statute 1910, Chapter 639.

"AN ACT RELATIVE TO THE ISSUE OF PREFERRED STOCK BY THE BOSTON RAILROAD HOLDING COMPANY.

"*Be it enacted, etc., as follows:*

"SECTION 1. The Boston Railroad Holding Company may, by a vote of a majority in interest of its common or general stockholders at a meeting called for that purpose, issue preferred stock, and from time to time increase the amount thereof, divided into shares of the par value of one hundred dollars each: *provided*, that the amount of such issue and of every such increase shall be approved by the board of railroad commissioners. The holders of such preferred stock shall, in preference and priority over all other stock of the corporation, be entitled, upon dissolution of the corporation or in liquidation of its affairs, or in case of a default in the payment of any stipulated dividend on said preferred stock, to payment of the par value thereof and accrued dividends thereon, and shall further be entitled to semi-annual dividends, to be paid out of the net profits of the corporation, at a rate to be approved by the board of railroad commissioners, but not to exceed, however, five per cent per annum, which dividends shall be cumulative. Said preferred stock shall not be entitled to participate in any increase or issue of new stock, common or preferred, which may be made by said corporation, shall not have any voting power, shall not be counted with the common stock in questions of majorities and quorum, and shall be subject to such other restrictions, qualifications and limitations and entitled to such other privileges and priorities, not inconsistent with the provisions of this act, as shall be approved by the board of railroad commissioners on petition of said Boston Railroad Holding Company.

"SECTION 2. Subject only to the rights of creditors of said Boston Railroad Holding Company existing at the date of the stockholders' meeting at which any of said preferred stock is first authorized, said preferred stock, to the amount thereof at par at any time outstanding, and of all accrued and unpaid dividends thereon, shall be and constitute a charge and lien upon, and be secured by, all stock of the Boston and Maine Railroad at any time held by said Boston Railroad Holding Company.

"SECTION 3. If authority to sell the shares of Boston and Maine Railroad, as provided for by section three of chapter five hundred and nineteen of the acts of the year nineteen hundred and nine, shall be granted by the general court, the Boston Railroad Holding Company may forthwith retire and cancel its preferred shares upon paying the holders thereof compensation determined as provided in section seven of Part II of chapter four hundred and sixty-three of the acts of the year nineteen hundred and six, but not less than the par value thereof and accrued dividends thereon, and after thirty days from the commencing of proceedings for such determination the supreme judicial court shall have jurisdiction therein to authorize the sale of said Boston and Maine Railroad stock free from the lien of the holders of said Boston Railroad Holding Company preferred stock, upon such terms securing the rights of said holders as the court shall find to be just and reasonable.

"SECTION 4. Subject to the reserved right of the commonwealth, under section four of chapter five hundred and nineteen of the acts of the year nineteen hundred and nine to take or acquire, by purchase or otherwise, the said preferred stock of the Boston Railroad Holding Company, the holders of a majority thereof may, in case of a default in the payment of any semi-annual dividend upon such pre-

ferred stock, apply in person or by attorney to the supreme judicial court for an order for the sale of said Boston and Maine Railroad stock, and said court may make such order as in its discretion justice and equity shall require for the enforcement of the lien of said preferred stock upon said Boston and Maine Railroad stock, and the same shall be sold in accordance with the terms of such order unless prior to such sale the dividend in default, and the amount of any subsequently defaulted dividends, shall be paid by said Boston Railroad Holding Company upon all its outstanding preferred stock; but no decree for a sale shall be made until the court shall be satisfied that the general court has had a sufficient opportunity to determine whether it will exercise the privilege to purchase the securities of the Boston Railroad Holding Company secured to it by section four of said chapter five hundred and nineteen. In case of any such sale, the proceeds thereof shall be applied, after payment of expenses of the sale—first, to the discharge of any claims which existed prior to the date of the meeting at which any of such preferred stock was first authorized; second, to the payment of all accrued and unpaid dividends to which, by the terms of this act, such preferred stock was entitled to the date of said sale; third, to the payment in full, or if said proceeds are insufficient therefor then to the equal pro rata partial payment, of the par value of said preferred stock, and the balance, if any, of the proceeds shall be paid to said Boston Railroad Holding Company.

"Section 5. Any railroad corporation owning any of the common stock of said Boston Railroad Holding Company may acquire, hold, own and sell any of the preferred stock authorized by this act, and may guarantee the payment of the stipulated dividends thereon, and of the par value thereof in case of liquidation or distribution of said Boston Railroad Holding Company, and of any deficiency

resulting from a sale under the provisions of the preceding section of this act.

"SECTION 6. This act shall take effect upon its passage.

"Approved June 15, 1910."

Statute 1946, Chapter 518.

"AN ACT TO DISSOLVE BOSTON RAILROAD HOLDING COMPANY.

"Be it enacted, etc., as follows:

"SECTION 1. Boston Railroad Holding Company, organized under chapter five hundred and nineteen of the acts of nineteen hundred and nine, as amended, is hereby dissolved and its corporate existence is hereby terminated and annulled, subject to the provisions of section fifty-one of chapter one hundred and fifty-five of the General Laws, and subject to the other provisions hereof; provided, that the applicable provisions of section three of this act shall not apply if the holder of all the common stock of Boston Railroad Holding Company shall, on or before July first nineteen hundred and forty-seven, transfer to Boston and Maine Railroad Company or its nominee, all of such stock; and provided, further, that in the event of such transfer, the holder of a majority of the preferred stock of Boston Railroad Holding Company shall, on or before July first, nineteen hundred and forty-eight, upon the basis of defaults in the payment of semi-annual dividends which have occurred prior to the effective date of this act, apply in person or by attorney to the supreme judicial court for an order for the sale of the stock, bonds, notes or other evidences of indebtedness of Boston and Maine Railroad Company which may, at the time of such application, comprise the assets of Boston Railroad Holding Company, in the manner and as provided in said chapter five hundred and nineteen of the acts of nineteen hundred and nine and

chapter six hundred and thirty-nine of the acts of nineteen hundred and ten except as they may be modified by the provisions of this act.

"SECTION 2. Nothing in this act shall be construed to affect any suit now pending by or against said corporation or any suits now pending or hereafter brought for any liability now existing against the stockholders or officers of said corporation.

"SECTION 3. If the holder of all the common stock of Boston Railroad Holding Company shall not on or before July first nineteen hundred and forty-seven transfer such stock to Boston and Maine Railroad Company or its nominee as provided in section one, or if, such transfer having been made, the holder or holders of a majority of the preferred stock of Boston Railroad Holding Company shall not have petitioned the supreme judicial court on or before July first, nineteen hundred and forty-eight, for an order for the sale of the stock, bonds, notes or other evidences of indebtedness of Boston and Maine Railroad Company in the manner and subject to the conditions as provided in said chapter five hundred and nineteen of the acts of nineteen hundred and nine and said chapter six hundred and thirty-nine of the acts of nineteen hundred and ten, then and in either of those events the supreme judicial court, upon application of the attorney general on behalf of the commonwealth, or upon application of a creditor or stockholder of Boston Railroad Holding Company, shall appoint a receiver to take charge of the estate and effects of said corporation and to collect the debts and property due and belonging to it, with power to prosecute and defend suits in its name or otherwise, to appoint agents under him and to do all other acts which might be done by said corporation, if in being, which may be necessary for the final settlement of its unfinished business. If such application is not made by the attorney general, the commonwealth

shall be made a party to such proceedings. The powers of such receiver and the existence of said corporation may be continued only so long as the court finds necessary for said purposes. Said receiver shall have the right to vote the stock of Boston and Maine Railroad.

"SECTION 4. Nothing in this act shall affect the rights of the holders of the publicly held or other preferred stock of Boston Railroad Holding Company, or the lien or liens or priority or priorities, existing in favor of such stock or any thereof. Said receiver shall distribute the assets in accordance with the rights of the respective parties in interest as determined by the court. Said distribution may be made by a sale of the assets of Boston Railroad Holding Company (including stock of Boston and Maine Railroad) and the distribution of cash, or by the distribution of such assets in kind; provided, that no distribution or sale of said stock of Boston and Maine Railroad shall be made pursuant to this act unless there shall have been furnished to the court by the department of public utilities satisfactory evidence showing that no distributee or purchaser (other than Boston and Maine Railroad) shall hold stock carrying more than five per cent of the total vote to which shareholders of Boston and Maine Railroad are then entitled; and provided, further, that no such sale or distribution shall be made before May first, nineteen hundred and forty-eight, except pursuant to a plan of liquidation approved by a majority of each class of stock (including as a separate class the publicly held preferred stock if the court shall determine that such preferred has rights differing from the rights of the other preferred) of Boston Railroad Holding Company, and approved by the court as fair and equitable. A plan of liquidation may be presented by any creditor or stockholder of Boston Railroad Holding Company, or by the receiver, or by the attorney general of the commonwealth.

"SECTION 5. Boston Railroad Holding Company is hereby prohibited from borrowing any money for the purpose of acquiring any of its preferred or common stock.

"SECTION 6. Nothing in this act shall be construed to relieve the person who was the treasurer or assistant treasurer, or in his absence or incapacity who was any other principal officer, of said corporation from the obligation to make such tax returns in the current year as are required by law, and the tax liability of said corporation shall be determined in accordance with the law of the commonwealth on the effective date of this act.

"Approved June 11, 1946."

United States Bankruptcy Act (Title 11, U.S.C., § 205).

"(f) Binding effect of confirmation; discharge of debtor from liabilities; issuance of securities.

"Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to

the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of chapter 1 of Title 49 as on August 27, 1935, or thereafter amended. The provisions of sections 77a to 77aa of Title 15 shall not apply to the issuance, sale, or exchange of any of the following securities, which securities and transactions therein shall, for the purposes of said sections, be treated as if they were specifically mentioned in sections 77c and 77d of Title 15, respectively: (1) All securities issued pursuant to any plan of reorganization confirmed by the judge in accordance with the provisions of this section; (2) all securities issued pursuant to such plan for the purpose of raising money for working capital and other purposes of such plan; (3) all securities

issued by the debtor or by the trustee or trustees pursuant to subsection (c), clause (3) of this section; (4) all certificates of deposit representing securities of or claims against, the debtor, with the exception of such certificates of deposit as are issued by committees not subject to subsection (p) of this section. The provisions of subdivision (a) of section 78n of Title 15 shall not be applicable with respect to any action or matter which is within the provisions of subsection (p) of this section."

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